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Alison Frankel

Class action firm maligned by 7th Circuit wants its reputation back

By Alison Frankel
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There's essentially no way to undo the reputational harm of a judicial opinion. If a federal judge – especially an appellate judge – has something bad to say about you in a published opinion, your permanent record (as we used to say in grade school) is forever besmirched even if it later turns out that the opinion was based on misinformation. You can't sue a judge for libel for what's said in an opinion, and judicial rulings live on forever.

You can't even expect to win a suit against news organizations that reported accurately on the contents of the opinion, which means that you just have to grit your teeth and bear it when the Internet continues to echo your shame, however undeservedly.

It's pretty small consolation, it seems to me, to sue those who have supposedly reported erroneously on your bench-slapping. You're forced to endure a rehashing of the facts that led to the judicial opinion, as well as the opinion itself, which is a heavy counterbalance to the benefit of proving one detractor wrong. Nevertheless, the Chicago class action firm of Bock & Hatch, which was the subject of a brutal 2011 opinion from the 7th Circuit Court of Appeals, is reportedly willing to accept that downside. According to Law360, **Bock & Hatch** has filed a libel suit against McGuireWoods, whose Class Action Countermeasures Blog posted an item on the 7th Circuit's decision back in November 2011.

I should say here that I don't know precisely what the complaint alleges. I reached out to multiple folks at Bock & Hatch, including name partner Philip Bock, to request a copy of the libel suit, which is not yet posted on Cook County's electronic docket. None was willing to supply it. McGuireWoods representative Robert Lewis told me the firm has seen the complaint "and will respond at the appropriate time." He supplied me with the case number but said he didn't have the complaint. So I don't know exactly what Bock & Hatch claims McGuire Woods got wrong. (The firm's post does note that it was edited about three weeks after it went up "to correct some information.") I also don't know how Bock & Hatch hopes to get past the one-year statute of limitations for libel in Illinois.

But I can understand why the class action firm wants to set the record straight by whatever means available. Law360's report sent me back to the docket of the case that spurred the 7th Circuit opinion. What I learned is that the appeals court issued its ruling on the basis of incomplete information.

The November 2011 opinion, written by Judge **Richard Posner**, called out Bock & Hatch, by name, for showing "a lack of integrity that casts serious doubt on their trustworthiness as representatives of the class." As Posner recounted, the trial judge's class certification decision found two kinds of misconduct by the firm and its co-counsel. (Both firms specialized in cases asserting statutory damages under the federal "junk fax" law.) The firms had supposedly obtained a database of potential junk fax defendants by falsely promising confidentiality to the owner of a fax broadcast business that sent out the unwanted missives on their behalf; and the firms had falsely implied the existence of an ongoing class action when they sent letters to recipients of those junk faxes.

The trial court, U.S. District Judge **Robert Gettleman** of Chicago, said that the misconduct was a matter for the state bar and certified a class of about 15,000 recipients of some 22,000 faxes from a tiny California company called Ashford Gear. The 7th Circuit opinion vacated Gettleman's ruling and ordered him to "re-evaluate the gravity of class counsel's misconduct and its implications for the likelihood that class counsel will adequately represent the class." Class members are at the mercy of their lawyers, the appeals court said, since any recovery would almost surely be through a settlement. The only way for courts to be sure class counsel is looking out for the class – rather than making a collusive deal to benefit themselves – is to be absolutely certain of the plaintiffs lawyers' integrity. (It seems to me that Judge Posner was already dubious about junk-fax class actions by the time of the Bock & Hatch opinion; he noted that the firm had filed dozens of cases based on information from the same mass fax operation, including a case previously decertified by the 7th Circuit in a different Posner opinion.)

The supposed misconduct that prompted the 7th Circuit's opinion had been asserted by Ashford Gear's counsel at the very end of briefing on class certification, and Judge Gettleman cut off additional briefing before Bock & Hatch and its co-counsel, **Anderson & Wanca**, could respond. The plaintiffs firms didn't file any briefs at the 7th Circuit, so Posner and his fellow appeals court judges didn't hear their side of the story either.

When the case returned to Gettleman for reconsideration of certification, the firms explained in a brief in support of certification that they'd done nothing wrong. According to the brief, the plaintiffs firms didn't obtain any information by falsely promising confidentiality to fax broadcaster Caroline Abraham. By their telling, Abraham hadn't even given them information. They obtained the names of her junk-fax clients by a subpoena served on her son, who worked with her. The records were produced by the Abrahams' lawyer, with no promise of confidentiality. Nor was the lead plaintiff, the Creative Montessori Learning Center, under any misapprehensions when it signed on in the case; the school responded to a letter from the plaintiffs firms with a note indicating that it wanted to stop receiving junk-fax solicitations and inviting the lawyers to call.

Ashford submitted its own brief in opposition, reiterating arguments that the plaintiffs lawyers had once promised confidentiality to the mass spammer and detailing the long history of contacts between her and Bock & Hatch and Anderson & Wanca. But when Judge Gettleman issued his new class certification opinion he concluded that the new record indicated the plaintiffs firms would serve

the class loyally. He said the evidence showed that the firms had obtained information from fax broadcaster Abraham not by breaking a promise of confidentiality but through the legitimate discovery process. And in any event, he said, the source of their information didn't cast doubt on class counsel's ability to represent class members. Gettleman pointed out that defendants in several other junk-fax class actions filed by Bock & Hatch and Anderson & Wanca made similar arguments about the firms' misconduct in obtaining defendants' names from Abraham; at least four other federal judges, he said, agreed with him that the firms were adequate class counsel despite the allegations.

Gettleman said he still considered the firms' letter to the Montessori school to have been misleading because it suggested the school was already the member of a class when no class had been certified. But he said the letter didn't preclude the firms from serving as class counsel. "Nothing about the manner by which counsel solicited plaintiff renders counsel inadequate to represent the class," the judge wrote. Gettleman recertified the class and reappointed Bock & Hatch and Anderson & Wanca class counsel in September 2012. According to the docket, he's now entertaining summary judgment briefing.

I suppose Bock & Hatch's filing of a libel suit against McGuireWoods has at least served the purpose of inspiring one reporter – me – to write about the firm's exoneration. That hardly erases the taint of the 7th Circuit's assumptions in that November 2011 decision, but it's better than nothing.

(Reporting by Alison Frankel)

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